

No. 15787

United States
Court of Appeals
for the Ninth Circuit

UNDERWRITERS SERVICE, INC., a corpora-
tion, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

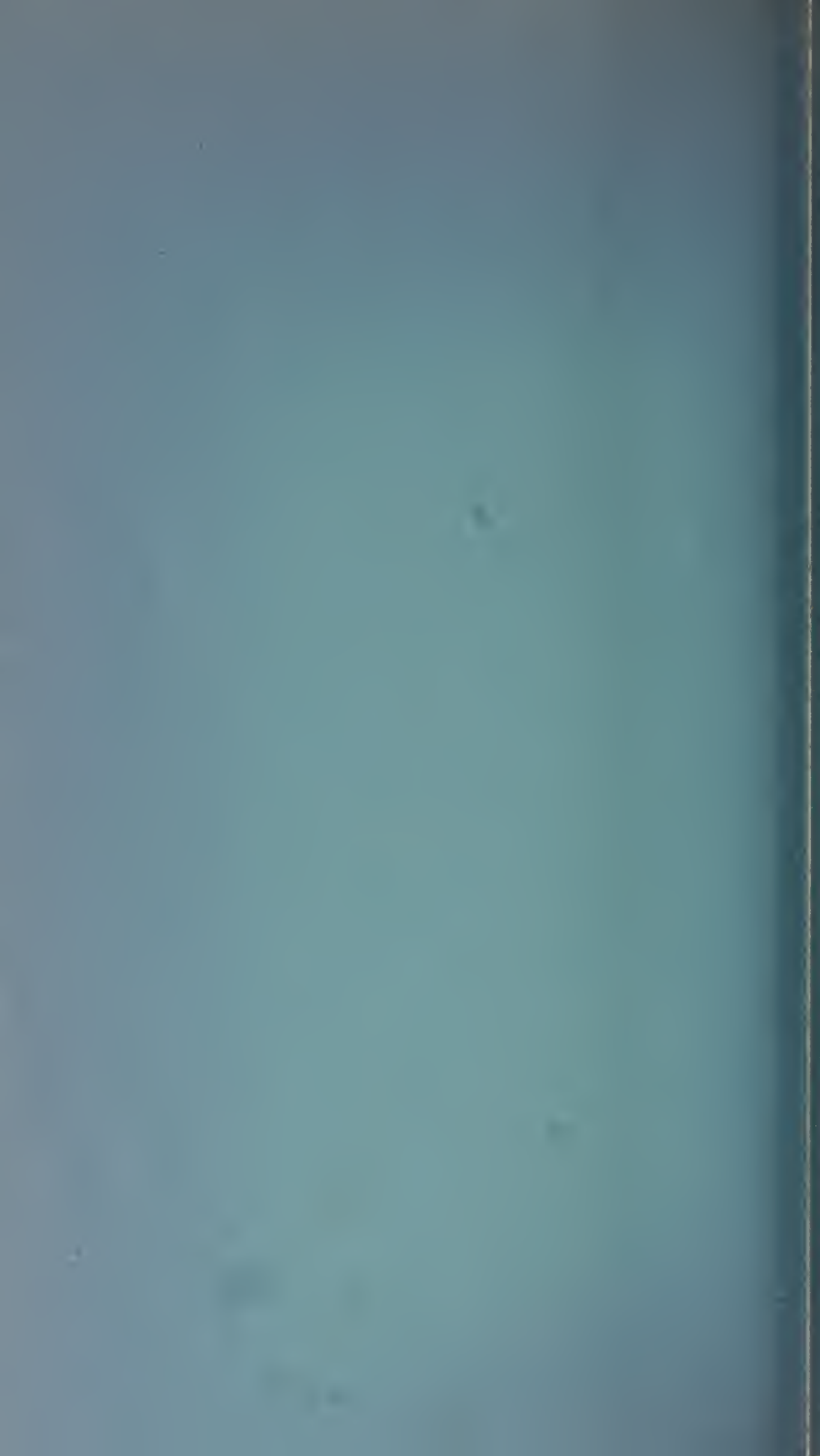
Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

FEB 18 1958

PAUL P. O'BRIEN, CLERK



No. 15787

United States
Court of Appeals
for the Ninth Circuit

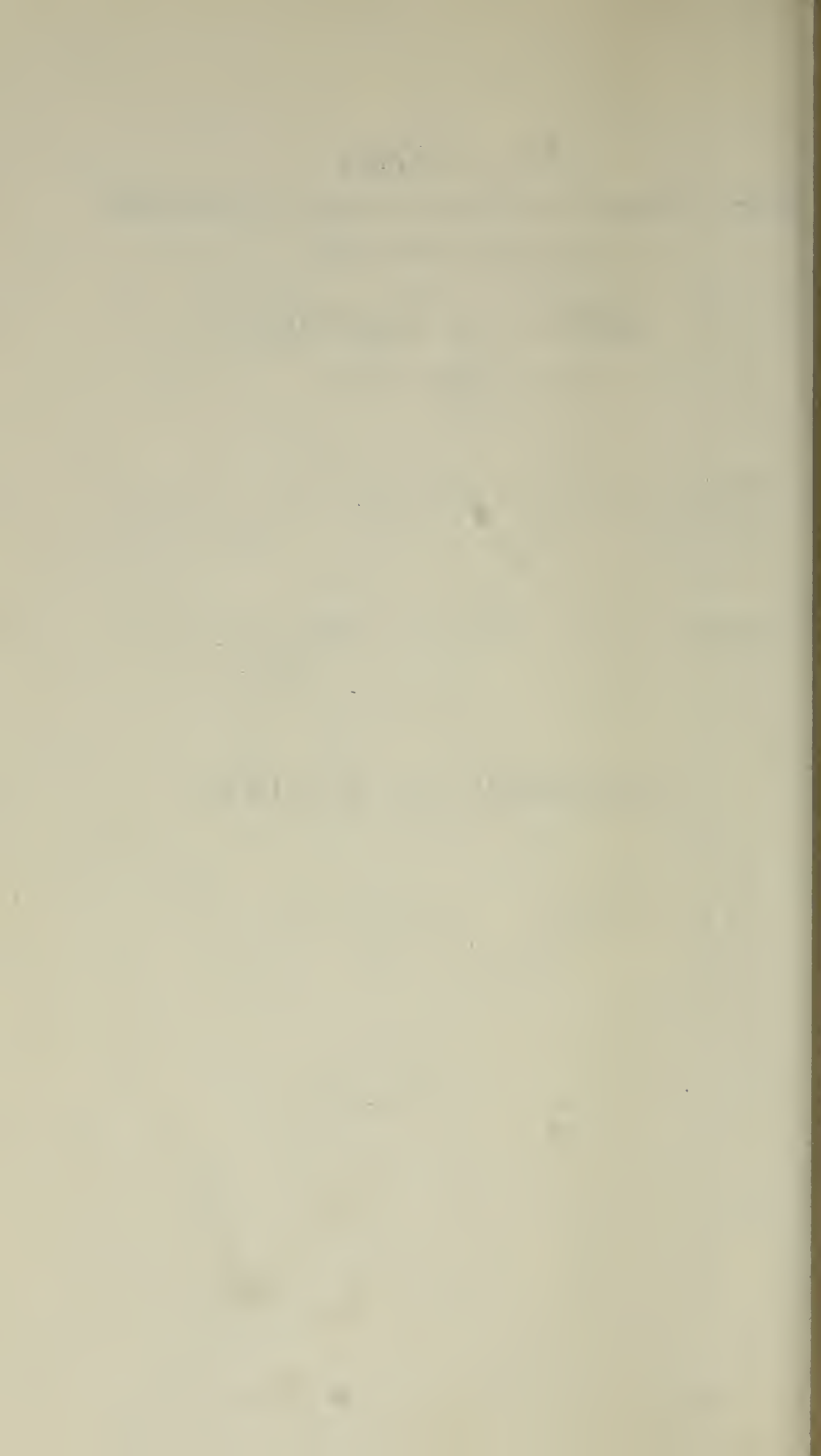
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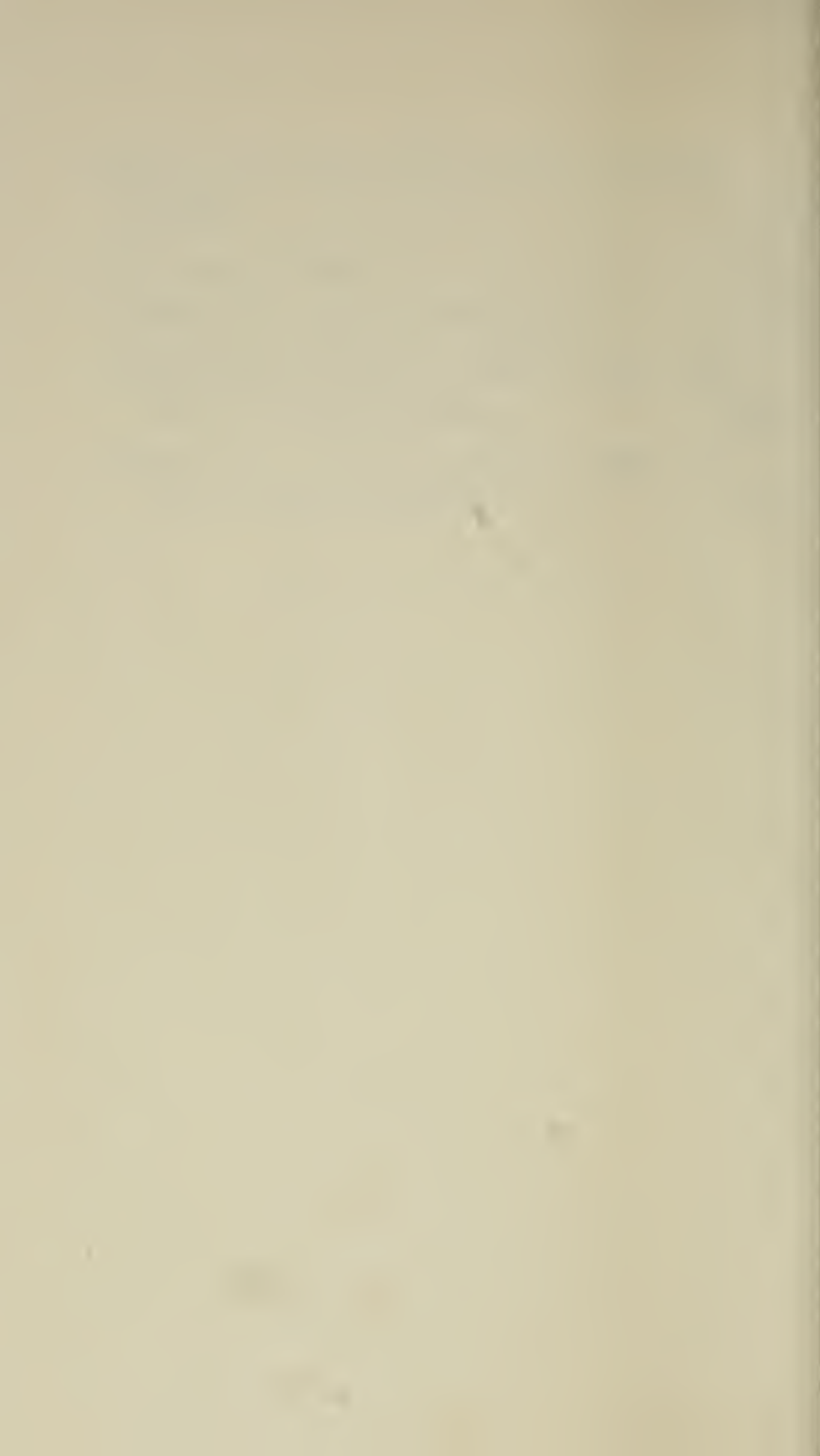
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco 4, California,

Attorneys for Petitioner.

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Attorney, Tax Division,

Department of Justice,

Washington 25, D. C.,

Attorneys for Respondent.

APPEARANCES

For Petitioner:

GEORGE E. LINK,
EDWARD J. RUFF.

For Respondent:

R. C. WHITLEY,
A. S. RESNIK.

Transferred to Judge Murdock, 4/19/57.

The Tax Court of the United States

Docket No. 55706

UNDERWRITERS SERVICE, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1954

Dec. 27—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 28—Copy of petition served on General Counsel.

Dec. 27—Request for circuit hearing in San Francisco, Calif., filed by taxpayer. 1/6/55
Granted.

1955

Jan. 28—Answer filed by General Counsel.

Feb. 1—Copy of answer served on taxpayer—San Francisco, Calif.

1956

May 25—Motion for leave to file amendment to answer, amendment to answer lodged, filed by Respondent. Served 6/29/56.

May 29—Hearing set on Respondent's motion June 27, 1956, Wash., D. C.

Jun. 27—Hearing had before Judge Murdock on Respondent's motion for leave to file amended answer, Ordered—Granted.

Jun. 27—Motion of 5/25/56—Granted.

Jul. 20—Hearing set 8/27/56—San Francisco, Calif.

Aug. 27—Hearing had before Judge Opper on the merits, Stipulation of Facts filed at hearing, with exhibits 1-A thru 3-C attached, and (oral supplemental stipulation) Exhibits 4-D and 5-E, Petitioner's brief due 9/26/56—Respondent's brief due 11/14/56, Replies due 11/29/56.

Sep. 24—Transcript of Hearing 8/27/56 filed.

Sep. 27—Brief filed by Petitioner. 9/28/56 served.

Nov. 14—Respondent's Brief in answer, filed.
11/15/56 served.

Nov. 28—Reply Brief by Petitioner. 11/28/56 served.

1957

May 13—Opinion rendered—Judge Murdock—Decision will be entered in accordance with the Commissioner's determination. Served 5/14/57.

May 17—Decision entered—Judge Murdock—Div. 3. Served 5/20/57.

Aug. 14—Petition for Review by U. S. Court of Appeals, 9th Circuit, with assignments of error filed by Petitioner.

Aug. 14—Affidavit of service by mail of notice of filing petition for review and petition for review, filed.

Aug. 15—Proof of service of petition for review, filed.

Aug. 30—Affidavit of service by mail of notice of filing petition for review and petition for review, filed.

Sep. 3—Proof of service of petition for review, filed.

Sep. 25—Designation of contents of record on review with proof of service filed.

Sep. 25—Affidavit of service by mail of designation, filed.

Oct. 10—Designation of contents of record on review with proof of service thereon, filed.

[Title of Tax Court and Cause.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Ap:SF:AA:WBH 90-D:HGP) dated September 28, 1954 and as a basis for its proceeding alleges as follows:

I.

The petitioner is a corporation duly organized under the laws of the State of California, with principal office at 369 Pine Street, San Francisco 4, California, having recently moved from the address to which the Commissioner's deficiency notice was mailed. The returns for the calendar years 1950 and 1951 were filed with the Collector of Internal Revenue for the First District of California and the return for the calendar year 1952 was filed with the District Director of Internal Revenue at San Francisco, California.

II.

The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on September 28, 1954.

III.

The deficiencies as determined by the Commissioner are in excess profits taxes for the calendar years 1950, 1951 and 1952 in the amounts of \$1,043.52, \$9,791.02 and \$7,089.25 respectively, or

an aggregate amount for all years of \$17,923.79, all of which is in dispute.

IV.

The determination of tax set forth in the said notice of deficiency is based upon the following error:

In computing the liability for excess profits tax for each of the periods here involved the Commissioner improperly and erroneously determined the excess profits credit based upon income by finding that the aggregate recomputed excess profits tax net income for the 12 consecutive months constituting the calendar year 1946 was \$139,787.76 rather than \$233,722.23. This erroneous finding results from the failure to recognize that petitioner had three taxable years during the calendar year 1946 for the purpose of applying Section 435(d)(1) of the Internal Revenue Code of 1939.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

a. The petitioner is a corporation organized under the laws of the State of California on May 19, 1937.

b. On September 20, 1946, Henry J. Kaiser Company, acquired all of the stock of petitioner, and continued to hold all of such stock until December 18, 1946, on which date Henry J. Kaiser Company sold a substantial portion of stock and thereafter owned less than 95% of the outstanding stock of petitioner.

c. Henry J. Kaiser Company was the common parent of an affiliated group of corporations which filed a consolidated return for the taxable year ended June 30, 1947. Pursuant to a ruling of the Bureau of the Internal Revenue dated April 18, 1947, (a copy of which is attached hereto and marked "Exhibit B") the income of petitioner for the period it was a wholly owned subsidiary of Henry J. Kaiser Company was included in the consolidated return of the affiliated group of corporations of which Henry J. Kaiser Company was the common parent.

d. Pursuant to the direction of the ruling set forth as "Exhibit B", petitioner filed a separate income tax return for the taxable period January 1, 1946 to September 20, 1946, and a separate income tax return for the taxable period December 18, 1946 to December 31, 1946.

e. The excess profits net income for the taxable period January 1, 1946 to September 20, 1946 was \$68,174.60. The excess profits net income for the taxable period September 21, 1946 to December 17, 1946 was \$78,519.90. The excess profits net income for the taxable period December 18, 1946 to December 31, 1946 was a loss in the amount of \$7,131.61.

f. The excess profits net income of petitioner for the months of January, February, March, April, May, June, July and August of 1946 is \$8,521.83 for each month. The excess profits net income of petitioner for the month of September 1946 is \$47,778.28. The excess profits net income of petitioner for the months of October and November

of 1946 is \$39,256.45 for each month. The excess profits net income of petitioner for December 1946 is \$39,256.45.

g. The aggregate excess profits net income of petitioner for the twelve consecutive months in 1946 is \$233,722.23.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that the excess profits net income for each of the twelve consecutive months constituting the calendar year 1946 is as alleged herein and petitioner prays for such other, further and different relief as to this Court may seem meet and proper in the premises.

Dated: December 22, 1954.

/s/ GEORGE E. LINK.

/s/ EDWARD J. RUFF.

Duly Verified.

EXHIBIT "A"

Regional

Appellate Division—San Francisco Region

Room 1010—870 Market Street

San Francisco 2, California

Ap:SF:AA:WBH—90-D:HGP

Sep. 28, 1954

Underwriters Service, Inc.,

114 Sansome Street

San Francisco 4, California

Gentlemen:

You are advised that the determination of your

income and excess profits tax liability for the taxable years ended December 31, 1950, December 31, 1951 and December 31, 1952 disclosed deficiencies in tax aggregating \$17,923.79 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Room 1010, 870 Market Street, San Francisco 2, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assess-

ment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,
Commissioner.

By /s/ Louis B. Braunagel,
Technical Advisor,
Appellate Division.

Enclosures:

Statement

Form 1276

Agreement Form

STATEMENT

Ap:SF:AA:WBH—90-D:HGP

Underwriters Service, Inc.

114 Sansome Street

San Francisco 4, California

Tax Liability for the Taxable Years Ended December 31, 1950,
December 31, 1951 and December 31, 1952
Income and Excess Profits Tax

Year	Liability	Assessed	Deficiency
1950.....	\$ 65,637.87	\$ 64,594.35	\$ 1,043.52
1951.....	172,321.94	162,530.92	1,791.02
1951.....	172,321.94	162,530.92	1,791.02
Totals.....	<u>\$411,444.17</u>	<u>\$393,520.38</u>	<u>\$17,923.79</u>

In making this determination of your income and excess profits tax liability, careful consideration has been given to your protest filed June 28, 1954 and to the statements made at the conference held on September 3, 1954.

A copy of this letter and statement has been mailed to your

representative, Mr. George E. Link, Attorney, Thelen, Marrin, Johnson & Bridges, 111 Sutter Street, San Francisco 4, California.

Year: 1950

ADJUSTMENT TO NET INCOME

Net income as disclosed by return.....	\$165,110.65
Net income as corrected—no change.....	\$165,110.65

COMPUTATION OF TAX

Net income	\$165,110.65
Combined normal tax and surtax	
42% of \$165,110.65 less \$4,750.00.....	\$ 64,594.47
Alternative tax	\$ 64,594.35
Income tax	\$ 64,594.35
Excess profits tax.....	1,043.52
<hr/>	
Income and excess profits tax liability.....	\$ 65,637.87
Income and excess profits tax assessed:	
Original, Account No. 410242	
First California District.....	64,594.35
<hr/>	

Deficiency in income and excess profits tax.....	\$ 1,043.52
--	-------------

COMPUTATION OF ALTERNATIVE TAX

Surtax net income.....	\$165,110.65
Less: Excess of net long-term capital gain over short-term capital loss.....	12.50
<hr/>	
Surtax net income for purposes of alternative tax.....	\$165,098.15
Partial tax—42% of \$165,098.15 less \$4,750.00.....	\$ 64,591.22
Add: 25% of capital gain, above.....	3.13
<hr/>	
Alternative tax	\$ 64,594.35

Year: 1950

ADJUSTMENTS TO EXCESS PROFITS NET INCOME

Excess profits net income as disclosed by return.....	\$165,098.15
Excess profits net income as corrected—no change.....	\$165,098.15

EXCESS PROFITS CREDIT BASED ON INCOME

In the determination of your excess profits tax liability for the taxable years 1950, 1951 and 1952 you computed the excess profits credit based on income in the amounts of \$182,398.32 (1950),

Year: 1950—(Continued)

Excess Profits Credit Based on Income—(Continued)

\$180,321.94 (1951), and \$179,370.35 (1952). The amount of the credit in each instance was based on an average base period net income of \$213,834.31, in the determination of which, you considered the sum of \$225,200.40 applicable to the recomputed excess profits net income for the base year 1946.

It is held that in the determination of your excess profits tax liability for the taxable years 1950, 1951 and 1952, the excess profits credit based on income is \$158,198.07 (1950), \$156,406.39 (1951), and \$155,739.51 (1952). The amount of the credit in each instance is based on an average base period net income of \$185,363.42, in the determination of which, the amount of \$139,787.76 is considered to be the correct excess profits net income for the base year 1946.

	Calendar Year			
	1946	1947	1948	1949
Normal tax net income ..	\$139,791.09	\$129,859.50	\$201,426.97	\$214,417.80
Capital gains or losses.....	3.33	(30.65)	(58.48)	(399.27)
	<hr/>	<hr/>	<hr/>	<hr/>
	\$139,787.76	\$129,890.15	\$201,485.45	\$214,817.08
Aggregate of three highest years.....				\$556,090.28
Average base period net income.....				\$185,363.42
		1950	1951	1952
85% of \$185,363.42.....		\$157,588.91		
84% of \$185,363.42.....			\$155,705.27	
83% of \$185,363.42.....				\$153,851.64
12% of base period capital addition		639.16	639.16	639.16
12% of net capital addition for taxable year			61.96	1,248.71
		<hr/>	<hr/>	<hr/>
Excess profits credit based on income	\$158,198.07	\$156,406.39	\$155,739.51	
Excess profits credit based on income per taxpayer..	182,398.32	180,321.94	179,370.35	
	<hr/>	<hr/>	<hr/>	
Reduction in credit.....	\$ 24,200.25	\$ 23,915.55	\$ 23,630.84	

Year: 1950—(Continued)

BASE PERIOD CAPITAL ADDITION

	Year Ended 12-31-49	Year Ended 12-31-48	Year Ended 12-31-47
Total assets	\$299,106.92	\$234,209.97	\$181,311.88
Total liabilities	202,720.25	142,762.34	90,658.82
Equity capital.....	\$ 96,386.67	\$ 91,447.63	\$ 90,673.06
75% of borrowed capital....	None	None	None
Adjustment for interest on borrowed capital	None	None	None
Inadmissible assets	None	None	None
75% of loans to members of controlled groups.....	None	None	None
Yearly base period capital..	\$ 96,386.67	\$ 91,447.63	\$ 90,673.06
Excess of Column 1 over Column 2.....			\$ 4,939.04
50% of excess of Column 2 over Column 3.....			387.29
Base period capital addition.....			\$ 5,326.33
12% of base period capital addition.....			\$ 639.16

COMPUTATION OF EXCESS PROFITS TAX

Excess profits net income.....	\$165,098.15
Less: Excess profits credit.....	158,198.07
Adjusted excess profits net income.....	\$ 6,900.08
30% of \$6,900.08.....	\$ 2,070.02
62% of excess profits net income (62% of \$165,098.15).....	\$102,360.85
Less: Total normal tax and surtax on excess profits net income.....	64,591.22
Balance	\$ 37,769.02
Excess profits tax—\$2,070.02 or \$37,769.63 whichever is less.....	\$ 2,070.02
Proration of tax: 184/365 of \$2,070.02.....	\$ 1,043.52

Year 1951

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$278,420.50
Net income as corrected—no change.....	\$278,420.50

Year: 1951—(Continued)

COMPUTATION OF TAX

Net income.....	\$278,420.50
Combined normal tax and surtax, 50¾% of \$278,420.50 less \$5,500.00.....	\$135,798.40
Alternative tax	\$135,761.13
Income tax	\$135,761.13
Excess profits tax.....	36,560.81
<hr/>	
Income and excess profits tax liability.....	\$172,321.94
Income and excess profits tax assessed:	
Original, Account No. 4180136	
First California District.....	162,530.92
<hr/>	
Deficiency in income and excess profits tax.....	\$ 9,791.02

COMPUTATION OF ALTERNATIVE TAX

Surtax net income.....	\$278,420.50
Less: Excess of net long-term capital gain over short-term capital loss.....	144.74
<hr/>	
Surtax net income for purposes of alternative tax.....	\$278,275.76
Partial tax—50¾% of \$278,275.76 less \$5,500.00.....	\$135,724.95
Add: 25% of capital gain.....	36.18
<hr/>	
Alternative tax	\$135,761.13

ADJUSTMENTS TO EXCESS PROFITS NET INCOME

Excess profits net income as disclosed by return.....	\$278,275.76
Excess profits net income as corrected—no change....	\$278,275.76

EXCESS PROFITS CREDIT BASED ON INCOME

An excess profits credit of \$156,406.39 is allowed. See explanation for the year 1950.

COMPUTATION OF EXCESS PROFITS TAX

Excess profits net income.....	\$278,275.76
Excess profits credit.....	156,406.39
<hr/>	
Adjusted excess profits net income.....	\$121,869.37
30% of \$121,869.37.....	\$ 36,560.81
17¼% of \$278,275.76.....	\$ 48,002.57
Excess profits tax	\$ 36,560.81

Year 1952

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$275,723.82
Net income as corrected—no change.....	\$275,723.82

COMPUTATION OF TAX

Net income	\$275,723.82
Combined normal tax and surtax, 52% of \$275,723.82 less \$5,500.00.....	\$137,876.39
Alternative tax	\$137,696.56
Excess profits tax	35,787.80
<hr/>	
Income and excess profits tax liability.....	\$173,484.36
Income and excess profits tax assessed: Original, Account No. CI 322, First California District.....	166,395.11
<hr/>	
Deficiency in income and excess profits tax.....	\$ 7,089.25

COMPUTATION OF ALTERNATIVE TAX

Surtax net income.....	\$275,723.82
Less: Excess of net long-term capital gain over short-term capital loss.....	691.63
<hr/>	
Surtax net income for purposes of alternative tax.....	\$275,032.19
Partial tax—52% of \$275,032.19 less \$5,500.00.....	\$137,516.74
Add: 26% of capital gain.....	179.82
<hr/>	
Alternative tax	\$137,696.56

ADJUSTMENTS TO EXCESS PROFITS NET INCOME

Excess profits net income as disclosed by return.....	\$275,032.19
Excess profits net income as corrected—no change.....	\$275,032.19

EXCESS PROFITS CREDIT BASED ON INCOME

An excess profits credit of \$155,739.51 is allowed. See explanation for the year 1950.

COMPUTATION OF EXCESS PROFITS TAX

Excess profits net income.....	\$275,032.19
Excess profits credit.....	155,739.51
<hr/>	
Adjusted excess profits net income.....	\$119,292.68
30% of \$119,292.68.....	\$ 35,787.80
18% of \$275,032.19.....	\$ 49,505.79
Excess profits tax.....	\$ 35,787.80

EXHIBIT "B"

IT:P:CA
ECH-WTS

Apr. 18, 1947

Underwriters Service, Inc.
1924 Broadway
Oakland, California
Gentlemen:

This office is in receipt of a letter dated April 10, 1947, from the firm of Thelen, Marrin, Johnson & Bridges, 111 Sutter Street, San Francisco, California, dealing in part with the effect of the filing of a consolidated return, under the facts presented, on your established accounting period. Since this office has no record of a power of attorney on file authorizing such firm to represent your corporation in Federal income tax matters, reply is being made to you.

Your corporation which reports its income on the basis of a calendar year became a member of the affiliated group of which Henry J. Kaiser Company is the parent on September 20, 1946, and ceased to be a member of such group on December 18, 1946. The affiliated group of which your company was a member reports its income on the basis of a fiscal year ending June 30 and it is presently contemplated that a consolidated return will be filed for the period ending June 30, 1947. Upon the assumption that consolidated return will be filed, advice is requested whether your company will be required to adopt the fiscal year of Henry J. Kaiser Company or whether you may continue to report

on the basis of a calendar year. If your company is permitted to continue on a calendar year basis, advice is requested whether your company may report its income for the portions of the calendar year 1946 not covered by the consolidated return (that is for the period January 1, 1946, to September 18, 1946, and for the period December 21, 1946, to December 31, 1946) on one separate income tax return.

Section 23.14 of Regulations 104 states that the taxable year of an affiliated group which makes consolidated income tax return shall be the same as the taxable year of the common parent corporation; and upon having elected to file consolidated returns, each subsidiary corporation shall, not later than the close of the first consolidated income tax taxable year ending thereafter, adopt an annual accounting period, fiscal year or calendar year as the case may be, in conformity with that of the common parent.

Upon the basis of the facts presented where your corporation (which is on the calendar year basis) files a consolidated income tax return with the parent corporation and the other members of the affiliated group for the fiscal year of the parent ending June 30, 1947, it is held that your corporation is not required to change its accounting period to conform to that of the parent unless it files or is required to file a consolidated return with such affiliated group for the subsequent taxable year.

With respect to the filing of separate returns for periods not included in the consolidated return, section 23.13(g) of Regulations 104 states that if a corporation, during its taxable year (determined without regard to the affiliation), becomes a member of an affiliated group, its income for the portion of such taxable year not included in the consolidated return of such group must be included in a separate return (or, if a member of another affiliated group which makes a consolidated return for such period, then in such consolidated return). Such section further provides that if a corporation ceases to be a member of the affiliated group during the taxable year of the group, its income for the period after the time when it ceased to be a member of the group must be included in a separate return (or if it becomes a member of another affiliated group which makes a consolidated return for such period, then in such consolidated return).

It is held that the foregoing provisions of the regulations require in the case of the facts presented with respect to your corporation that a separate return be filed for each period during the calendar year 1946 in which your corporation was not a member of the affiliated group. Accordingly, one separate income tax return should be filed for the period January 1, 1946, to September 20, 1946, and another return should be filed for the period December 19, 1946, to December 31, 1946. Each period of less than 12 months for which either a separate or consolidated return is filed, under the provisions

of section 23.13, shall be considered as a taxable year. (Section 23.13(g) of Regulations 104.)

Very truly yours,

/s/ E. I. McLarney,

Deputy Commissioner.

Copy attached.

[Endorsed]: T.C.U.S. December 27, 1954.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

I, II and III.

Admits the allegations contained in paragraphs I, II and III of the petition.

IV.

Denies the allegations of error contained in paragraph IV of the petition.

V.

a. Admits the allegations contained in subparagraph a of paragraph V of the petition.

b, c and d. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs b, c and d of paragraph V of the petition.

V.

e, f and g. Denies the allegations contained in subparagraphs e, f and g of paragraph V of the petition.

VI.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ R. P. HERTZOG,

Acting Chief Counsel,

Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
T. M. Mather, Assistant Regional Counsel, A.
S. Resnik, Special Attorney, San Francisco
Region, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed January 28, 1955.

[Title of Tax Court and Cause.]

AMENDMENT TO ANSWER

Now comes the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, leave having been previously granted, and amends his answer in the said case by eliminating the prayer of the answer and by inserting a paragraph and prayer as herein below set forth to follow paragraph VI of the answer.

VII.

Further answering the petition herein and in the alternative if the Court determines the facts to be as generally set forth in sub-paragraphs (b) to (e), inclusive, of paragraph V of the petition, the respondent alleges as follows:

(a) During period from September 20, 1946 to December 18, 1946 petitioner was a member of a consolidated group and its income for that period was reported by its parent on a consolidated return.

(b) During the aforementioned period and by virtue of such consolidation and such reporting of its income for Federal tax, petitioner had no separate existence within the purview of Section 435 (d)(1) of the Internal Revenue Code of 1939.

(c) For each month during that period, petitioner's income is deemed to be zero.

(d) By a determination that petitioner's income for each month that it had no separate existence is zero, it is to the benefit of petitioner to eliminate in the computation of its excess profits tax credit the twelve months of the year 1946.

(e) Petitioner's average base period net income computed by elimination of the twelve months of 1946 is \$182,064.22 as compared to the amount of \$185,363.42, as determined in the statutory notice.

(f) The reduction in petitioner's average base period net income results in a revision of petitioner's excess profits tax credit based on income for each of the years in issue, as follows:

Year	Credit Per	
	Statutory Notice	Revised Credit
1950	\$158,198.07	\$155,393.75
1951	\$156,406.39	\$153,635.06
1952	\$155,739.51	\$153,001.17

(g) Such reduction in credit for each of the years involved causes an increase in deficiency in tax as set forth below and claim for such increased deficiencies for each of the years involved is hereby made:

Year	Increase in	
	Deficiency	Revised Deficiency
1950	\$424.10	\$1,467.62
1951	\$831.40	\$10,622.42
1952	\$821.51	\$7,910.76

Wherefore, it is prayed that:

(1) Respondent's determination be approved and petitioner's appeal be denied; and

(2) In the alternative and as more fully developed herein above; that the Court redetermine the deficiencies herein to be the amounts determined by the respondent in the statutory notice plus increases in the deficiencies for each of the years 1950 to 1952, inclusive, in the respective amounts of \$424.10; \$831.40; and \$821.51; claim for each is hereby made pursuant to the provisions of Section 272(e) of the Internal Revenue Code of 1939.

/s/ JOHN POTTS BARNES,
 Chief Counsel,
 Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, T. M. Mather, Assistant Regional Counsel, Aaron S. Resnik, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed June 27, 1956.

[Title of Tax Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective attorneys of record, that the following facts shall be taken as true, and may be considered by The Tax Court of the United States as in evidence, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts here stipulated to be taken as true, and The Tax Court of the United States may enter its findings and decisions herein on this stipulation of facts, exhibits attached hereto, the pleadings herein, and such other evidence of facts not inconsistent herewith, as may be introduced at the hearing of the case:

1. Petitioner is a California corporation duly incorporated on May 19, 1937, with its principal office at 369 Pine Street, San Francisco 4, California. Petitioner filed its Income and Excess Profits Tax Returns for the calendar years 1950 and 1951 with the Collector of Internal Revenue for the First District of California, at San Francisco, California, and for the calendar year 1952 with the Dis-

trict Director of Internal Revenue, at San Francisco, California. Petitioner was formerly Industrial Underwriters, Inc., and its name was changed to its present name on December 30, 1946.

2. Petitioner duly received a statutory notice dated September 28, 1954, advising of deficiencies in its excess profits tax liabilities as follows:

Year	Deficiency
1950	\$1,043.52
1951	9,791.02
1952	7,089.25

A copy of such statutory notice is attached hereto as "Exhibit 1-A".

3. On September 20, 1946, petitioner became a wholly owned subsidiary of Henry J. Kaiser Company and continued to be a wholly owned subsidiary of said Henry J. Kaiser Company until December 18, 1946, on which day Henry J. Kaiser Company ceased to own 95% of the voting stock of petitioner.

4. Henry J. Kaiser Company was the common parent of an affiliated group of corporations which filed a consolidated return for the taxable year of such common parent which ended June 30, 1947. The income of petitioner for the period it was a wholly owned subsidiary of Henry J. Kaiser Company, i.e. September 21, 1946 through December 18, 1946, was included in the consolidated return of the affiliated group of corporations of which Henry J. Kaiser Company was the common parent. The amount of net income of petitioner so included was \$79,012.90. On a separate return basis the net in-

come of petitioner for that period would have been \$78,512.90. However, for consolidated return purposes a deduction of a charitable contribution in the amount of \$500.00 was not properly allowable.

5. Pursuant to a letter of the Bureau of Internal Revenue dated April 18, 1947 (a copy of which is attached hereto and marked "Exhibit 2-B"), in response to a letter from the taxpayer's representative dated April 10, 1947 (a copy of which is attached hereto and marked "Exhibit 3-C"), petitioner filed a separate income tax return for the period January 1, 1946 through September 20, 1946, and a separate income tax return for the period December 19, 1946 through December 31, 1946.

6. Petitioner suffered a net operating loss during the period December 19, 1946 through December 31, 1946 in the amount of \$7,131.61. Petitioner filed a claim for a refund of a portion of the income taxes paid by it for the period January 1, 1946 through September 20, 1946, basing its claim on the carry-back of such net operating loss. The claim was allowed as filed.

7. The excess profits net income for the period January 1, 1946 to September 20, 1946, for which a separate return was filed, was \$68,174.60.

8. The excess profits net income for the period September 21, 1946 to December 18, 1946, the period in which petitioner's income was included in the consolidated return filed by Henry J. Kaiser Company and its affiliated corporations for its taxable year ended June 30, 1947, was \$78,512.90.

9. The excess profits net income for the period

December 19, 1946 to December 31, 1946, for which a separate return was filed, was a loss in the amount of \$7,131.61.

10. Petitioner did not close its books to reflect income for the fractional periods hereinabove referred to. The books were closed for the calendar year 1946 showing a profit of \$139,791.09, which amount was credited to surplus.

Dated: August 27, 1956.

/s/ GEORGE E. LINK,
Attorney for Petitioner.

/s/ JOHN POTTS BARNES, J. M.,
Chief Counsel, Internal Revenue Service, Attorney
for Respondent.

[Note: Exhibit 1-A is the same as Exhibit A set out at pages 9-16. Exhibit 2-B is the same as Exhibit B set out at pages 17-20.]

EXHIBIT "3-C"

[Law Offices of Thelen, Marrin, Johnson & Bridges,
One Eleven Sutter Street, San Francisco 4.]

(Copy)

At: 341 Tower Building, Washington, D. C.,
April 10, 1947.

Honorable Joseph D. Nunan, Jr.
Commissioner of Internal Revenue
Bureau of Internal Revenue Building
Washington 25, D. C.

Attention: Mr. Ferris

Dear Mr. Nunan:

Underwriters Service, Inc., a California corpora-

tion formerly known as Industrial Underwriters, Inc., has outstanding 2000 shares of stock of one class. On September 20, 1946, all of the outstanding stock of that corporation was acquired by Henry J. Kaiser Company, a Nevada corporation, and was held by it until December 18, 1946. On that date Henry J. Kaiser Company sold 1240 shares of the stock and since that time has held the remaining 760 shares.

The Henry J. Kaiser Company is the parent company of an affiliated group for which a consolidated return was filed for the fiscal year ended June 30, 1946. It is presently contemplated that a consolidated return will be made for the period ending June 30, 1947. During the portion of 1946 that it was a wholly owned subsidiary of the Henry J. Kaiser Company its income will be included in the consolidated return of the affiliated group. However, during the periods in 1946 in which the taxpayer was not a wholly owned subsidiary of the Henry J. Kaiser Company its income will be reported on separate returns.

Underwriters Service, Inc. has a calendar year accounting period. That company desires to maintain the calendar year basis and continue to report its income with reference to that period. We are concerned with the question of whether the taxpayer under the circumstances described is required to adopt the fiscal year period of Henry J. Kaiser Company or whether Underwriters Service, Inc. may continue to report its income on the basis of a

calendar year accounting period. If Underwriters Service, Inc. may continue to report its income on the calendar year basis the further question is raised as to whether the taxpayer may report its income for the portion of the calendar year 1946 not covered by the consolidated return on one separate return, i.e. a return showing the income for the period from January 1, 1946 to September 18, 1946 and another return for the period December 21, 1946 to December 31, 1946.

In behalf of Underwriters Service, Inc., we respectfully request a ruling of the Bureau of Internal Revenue on the questions raised herein.

The taxpayer has not yet filed a return for the calendar year 1946. Although the return for that year was due on March 15, 1947, the taxpayer was granted an extension of 60 days within which to file its return for that year. It will take some time to prepare the return after the receipt of the ruling requested herein and accordingly we earnestly solicit your prompt consideration of this matter.

Respectfully submitted,

THELEN, MARRIN, JOHNSON
& BRIDGES,

By GEORGE E. LINK.

GEL:avf

[Endorsed]: T.C.U.S. Filed August 27, 1956.

EXHIBIT "4-D"

Underwriters Service, Inc.

Docket No. 55706

CREDIT BASED ON INCOME

Taxable Periods

Jan. 1, 1946 Sept. 21, 1946 Dec. 18, 1946

to Sept. 20, 1946 to Dec. 31, 1946

Calendar Years

1947 1948 1949

Normal tax net income or loss * \$68,177.93 \$ 78,512.90 \$7,131.61* \$129,859.50 \$201,426.97 \$214,417.80

Net gains or loss* to which section 117(j) is applicable..... 3.33* 30.65 58.48 399.27

Excess profits net income or loss* \$68,174.60 \$ 78,512.90 \$7,131.61* \$129,890.15 \$201,485.45 \$214,817.07

Number of full calendar months in taxable period..... 8 2 0 12 12 12

Monthly average \$ 8,521.83 \$ 39,256.45 \$ 0 \$ 10,824.18 \$ 16,790.45 \$ 17,901.42

Highest 36 months..... 8 4 12 12 12 12

Recomputed excess profits net income \$68,174.60 \$157,025.80 \$201,485.45 \$214,817.07

EXHIBIT "5-E"

Underwriters Service, Inc.

Docket No. 55706

The following schedule represents a mode of computation of excess profits net income for the 12-month period of 1946 submitted by petitioner at a conference in the office of the Internal Revenue Agent, San Francisco.

1 Taxable Year	2		3		4		5		6 Column 4 and Column 5
	Excess profits net income for taxable year	Excess profits net income for each month or part of a month	Number of full months in taxable year	Excess profits net income for each month or part of a month	Number of full and part months in period				
1/ 1/46- 9/20/46.....	\$68,174.60	\$ 8,521.83	8	\$ 8,521.83	9			\$ 76,696.43	
9/21/46-12/18/46.....	78,512.90	39,256.45	2	39,256.45	4			157,025.80	
12/18/46-12/31/46.....	(7,131.61)	(7,131.61)	0	(7,131.61)	1			(7,131.61)	
Proposed total excess profits net income for the 12 months of the year 1946.....								\$226,590.62	

[Endorsed]: T.C.U.S. Filed Aug. 27, 1956.

28 T. C. No. 37

Tax Court of the United States
Underwriters Service, Inc., Petitioner, v. Commis-
sioner of Internal Revenue, Respondent.

Docket No. 55706. Filed May 13, 1957.

OPINION

Excess Profits Tax (Korean War)—Excess Profits Net Income Computation—§435(d)(1).—The petitioner's excess profits net income for the 12 months of 1946 under section 435(d)(1) is the same as its actual excess profits net income for that calendar year and the second sentence of that provision is inapplicable despite the fact that the petitioner was affiliated with Kaiser from September 21 through December 18 in 1946, filed two separate returns for the portions of the year when no affiliation existed and joined in a consolidated return to report its income for the affiliated period.

Statutory Construction. — Statutes must be reasonably construed.

George E. Link, Esq., for the petitioner.

Aaron S. Resnik, Esq., for the respondent.

Murdock, Judge: The Commissioner determined deficiencies in income and excess profits tax as follows:

1950	\$1,043.52
1951	9,791.02
1952	7,089.25

The sole issue is the proper method of computing the petitioner's excess profits net income for its base period year 1946 in order to arrive at its excess credit for the taxable years under the income method.

All of the facts are stipulated and are hereby found as stipulated.

The petitioner, a California corporation, filed its income and excess profits returns for 1950, 1951 and 1952 with the collector or district director of internal revenue at San Francisco, California.

The petitioner became a wholly owned subsidiary of the Henry J. Kaiser Company (hereinafter referred to as Kaiser) on September 20, 1946 and continued as such until December 18, 1946, when Kaiser ceased to own 95 per cent of the voting stock of the petitioner.

Kaiser was the common parent of an affiliated group of corporations which filed a consolidated return for the taxable year of such common parent which ended June 30, 1947. The petitioner's net income of \$79,012.90 for the affiliated period September 21, 1946, through December 18, 1946, was included in that consolidated return. The petitioner's separate net income for that period would have been \$78,512.90 by reason of a \$500 charitable deduction which was not allowable on the consolidated return.

The petitioner, by letter to the Commissioner dated April 10, 1947, asked for a ruling as to the proper method of reporting its income for the portions of 1946 during which it was not a member of

the Kaiser affiliated group. The petitioner stated that it desired to maintain its calendar year basis for reporting income and was concerned as to whether it would be required to adopt the fiscal year period of Kaiser.

The Commissioner replied by letter dated April 18, 1947, that the petitioner would not be required to change its accounting period to conform to that of Kaiser unless it was filing a consolidated return with Kaiser for the next year. The Commissioner also advised that the petitioner would be required to file a separate return for each period during 1946 when it was not a member of the affiliated group. The petitioner filed separate returns for the periods January 1, 1946, to September 20, 1946, and December 19, 1946, to December 31, 1946.

The petitioner's excess profits net income for the periods indicated was as follows:

January 1 to September 20, 1946. . . . \$68,174.60

September 21 to December 18, 1946. . . 78,512.90

(Included in Kaiser's consolidated
return)

December 19 to December 31, 1946. . . (7,131.61)

The petitioner filed and was allowed a claim for refund of a portion of the income taxes paid by it for the January 1 to September 20, 1946, period, based upon a carry-back of the December 19 to December 31, 1946, operating loss of \$7,131.61.

The books of the petitioner were not closed to reflect income for any of those fractional periods.

They were closed only once for the entire year 1946 showing a profit of \$139,791.09, which was credited to surplus.

The \$139,791.09, minus a statutory loss adjustment of \$3.33, or \$139,787.76, was determined by the Commissioner in his notice of deficiency to be the petitioner's excess profits net income for the 12 months of 1946.

The petitioner's excess profits credit for each of the taxable years is to be computed under section 435, which provides that it shall be a percentage of the average base period net income. The base period provided in this case began on January 1, 1946, and ended on December 31, 1949. Section 435(d) provides how the average base period net income shall be determined, and its first sentence is that it shall be determined by computing the excess profits net income for each month of the base period. The petitioner attacks the determination of the Commissioner only as to his determination for the 12 months of 1946. The Commissioner has correctly determined the excess profits net income for those 12 months.

The petitioner's contention is that the second sentence of section 435(d)(1) applies in this case:

* * * The excess profits net income for any month during any part of which the taxpayer was in existence shall be the excess profits net income for the taxable year in which such month falls divided by the number of full cal-

endar months in such year, but in no case shall the excess profits net income for any month be less than zero. * * *

That provision has no application to this case. The petitioner tries to make much of the reference to "taxable year" in the quoted sentence from section 435(d)(1). However, his reliance is misplaced as clearly appears when that sentence is read along with all of the other provisions of section 435. The purpose of that sentence is to give some slight relief in a situation where the taxpayer was in existence for only a part of the beginning month of one of its taxable years, necessarily a period of less than 12 full months, making up a part of the 48-month base period. This taxpayer had no such situation but was in existence both before January 1, 1946, and after December 31, 1949, before and after each separate short tax period, "taxable year", in the calendar year 1946 and during all of every one of the 12 months in the calendar year 1946. There is no occasion to compute its excess profits income for any month in 1946 during a part of which it was in existence and during a part of which it was not in existence, since there was no such month. Cf. *Helvering v. Morgan's, Inc.*, 293 U.S. 121. The fact that the petitioner filed two separate returns for portions of 1946 and that its income for the other portion of that year was reported in the consolidated return had no effect whatsoever upon the petitioner's excess profits net income for any of the 12 months in the calendar year 1946.

The petitioner, by a computation in which it purports to apply the quoted second sentence of section 435(d)(1), divides its excess profits net income for the period from January 1, 1946, through September 20, 1946, by 8 (months) and then multiplies the quotient by 9 (months); divides its excess profits net income for the period September 21, 1946, through December 18, 1946, by 2 (months) and then multiplies by 4 (months); subtracts its loss for the period from December 19, 1946, through December 31, 1946; and arrives at \$226,590.62 as the total excess profits net income for 1946, whereas its actual excess profits net income for the 12 months of 1946 was \$139,787.76. It has by this method expanded the 12 months of 1946 into 14 months and has computed excess profits net income for "taxable years" rather than for months. There is no authority in the law for any such unreasonable computation and no merit to the petitioner's contention in this case. Cf. *Church of the Holy Trinity v. United States*, 143 U.S. 457; *United States v. American Trucking Associations, Inc.*, 310 U.S. 534.

The conclusion that the Commissioner's determination in this case is correct requires rejection of his alternative computation upon which he bases a claim for increased deficiencies.

Decision will be entered in accordance with the Commissioner's determination.

Served and Entered May 14, 1957.

The Tax Court of the United States
Washington

Docket No. 55706

UNDERWRITERS SERVICE, INC.,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed May 13, 1957, it is

Ordered and Decided: That there are deficiencies in income and excess profits tax as follows:

Year	Deficiency
1950	\$1,043.52
1951	9,791.02
1952	7,089.25

Entered May 17, 1957.

/s/ J. S. MURDOCK,
Judge.

Served and Entered May 20, 1957.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 55706

UNDERWRITERS SERVICE, INC., a corpora-
tion, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF A DECISION
OF THE TAX COURT OF THE UNITED
STATES

To the Honorable Judges of the United States
Court of Appeals for the Ninth District:

Underwriters Service, Inc., a California corporation, the Petitioner in this cause, hereby files its petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by The Tax Court of the United States rendered on May 17, 1957, Docket No. 55706, determining deficiencies in petitioner's excess profits taxes for the calendar years 1950, 1951 and 1952, in the amounts of \$1,043.52, \$9,791.02, and \$7,089.25, respectively, for an aggregate amount for all years of \$17,923.79, and respectfully shows:

I.

Jurisdiction and Venue

Petitioner files this petition for review by the

United States Court of Appeals for the Ninth Circuit pursuant to the provisions of section 7481 to section 7483, inclusive, of the Internal Revenue Code of 1954, 26 U.S.C. section 7481 to section 7483 inclusive.

Petitioner, Underwriters Service, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office in San Francisco, California.

Petitioner's returns for the taxable years in question were filed with the Collector of Internal Revenue for the First District of California for the calendar years 1950 and 1951, and with the District Director of Internal Revenue at San Francisco, California, for the calendar year 1952.

II.

Nature of the Controversy

The controversy relates to the computation of Petitioner's excess profits tax credit for the calendar years 1950 through 1952. The single question of substantive tax law raised by this petition for review is whether or not the second sentence of section 435 (d) (1) of the Internal Revenue Code of 1939, 26 U.S.C.A. Excess Profits Tax, section 435 (d) (1), is to be applied in determining the excess profits tax net income of Petitioner for each of the months in the calendar year 1946.

All of the facts were stipulated. The stipulations and the exhibits attached thereto present the following factual situation:

On September 20, 1946, Henry J. Kaiser Company acquired all of the stock of Petitioner, and continued to hold all of such stock until December 18, 1946, on which date Henry J. Kaiser Company sold a substantial portion of stock and thereafter owned less than 95% of the outstanding stock of Petitioner.

The Henry J. Kaiser Company was the common parent of an affiliated group of corporations which filed a consolidated return for the taxable year ending June 30, 1947. Pursuant to a ruling of the Bureau of Internal Revenue, dated April 18, 1947, the income of Petitioner for the period it was a wholly-owned subsidiary of Henry J. Kaiser Company was included in the consolidated return of the affiliated group of corporations of which Henry J. Kaiser Company was the common parent.

Further pursuant to the direction of the ruling above mentioned, Petitioner filed a separate income tax return for the taxable period January 1, 1946, to September 20, 1946, and a separate income tax return for the taxable period December 18, 1946, to December 31, 1946.

The excess profits net income of petitioner for the taxable period January 1, 1946, to September 20, 1946, was \$68,174.60. The excess profits net income of petitioner included in said consolidated return for the taxable period September 21, 1946, to December 17, 1946, was \$78,519.90. The excess profits net income of petitioner for the taxable period December 18, 1946, to December 31, 1946, was a loss in the amount of \$7,131.61.

Petitioner computed its excess profits net income for the period involved by applying the formula contained in the second sentence of said Section 435 (d) (1) of the Internal Revenue Code of 1939, and concluded that its excess profits net income for the months of January, February, March, April, May, June, July and August of 1946 is \$8,521.83 for each month. The excess profits net income for the Petitioner for the month of September 1946 is \$47,778.28. The excess profits net income for Petitioner for the months of October and November of 1946 is \$39,256.45 for each month. The excess profits net income of Petitioner for December 1946 is \$39,256.45. The aggregate excess profits net income of Petitioner for the 12 consecutive months in 1946 is \$226,590.62.

The Commissioner of Internal Revenue, in complete disregard of the formula contained in said section, determined that the actual net profit realized by Petitioner for the calendar year 1946, in the amount of \$139,787.76, was Petitioner's excess profits net income for the 12 months of 1946, computed Petitioner's excess profits tax credit for the taxable years here in question on that basis, and determined the deficiencies in excess profits taxes for the taxable years ending on December 31, 1950, 1951 and 1952, as aforesaid.

III.

Review by the United States Court of Appeals
for the Ninth Circuit

Petitioner being aggrieved by the decision by The

Tax Court of the United States rendered on May 17, 1957, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

IV.

Assignments of Error

Petitioner assigns as error the following acts and omissions of The Tax Court of the United States:

1. The holding that the Commissioner of Internal Revenue has correctly determined the excess profits net income of Petitioner for the 12 months of 1946.

2. The holding that the second sentence of section 435 (d) (1) of the Internal Revenue Code of 1939 has no application to this case.

3. The failure to find and to hold that the second sentence of section 435 (d) (1) of the Internal Revenue Code of 1939 is the statutory formula by which the excess profits net income is computed for each month in the base period during any part of which a taxpayer was in existence, and that such formula was correctly and properly applied by Petitioner to its three taxable years within the calendar year 1946.

4. The failure to find and to hold that Petitioner pursuant to and in accordance with the said second sentence of section 435 (d) (1), correctly computed the excess profit net income for each of the 12 months in its base period in 1946, and properly computed and accounted for the excess profits tax credit in the years 1950 through 1952.

Dated: San Francisco, California, August 9, 1957.

Respectfully submitted,

/s/ GEORGE E. LINK,
Attorney for Petitioner.

Duly Verified.

[Endorsed]: T.C.U.S. Filed Aug. 14, 1957.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 17, inclusive, constitute and are all of the original papers on file in my office as called for the "Designation of Contents of Record on Review", including Exhibits 1-A through 5-E, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 23rd day of October, 1957.

[Seal]

HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15787. United States Court of Appeals for the Ninth Circuit. Underwriters Service, Inc., a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: November 5, 1957.

Docketed: November 15, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15787

UNDERWRITERS SERVICE, INC., a corporation,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

Statement of Points

Petitioner, Underwriters Service, Inc., a corporation, hereby submits a concise statement of the points upon which Petitioner intends to rely in this appeal, as follows:

(1) The Tax Court erred in not concluding as a

matter of law that the Commissioner has incorrectly determined the excess profits net income of Petitioner for the 12 months of 1946.

(2) The Tax Court erred in not concluding as a matter of law that the second sentence of Section 435(d)(1) of the Internal Revenue Code of 1939 is applicable to the facts as stipulated in this case.

(3) The Tax Court erred in not concluding as a matter of law that each of the periods for which a separate or consolidated income tax return was filed returning Petitioner's income for the calendar year 1946 is a taxable year within the definition of the term "taxable year" in section 48(a) of the Internal Revenue Code of 1939, the Respondent's Regulations issued pursuant thereto and Respondent's Rulings pertaining thereto.

(4) The Tax Court erred in not concluding as a matter of law that, according to the clear terms of Section 435(d)(1) of the Internal Revenue Code of 1939, the excess profits tax net income of Petitioner for each month during the calendar year 1946 is arrived at by dividing the excess profits tax net income for each of the taxable years by the number of full calendar months in such period.

(5) The Tax Court erred in not concluding as a matter of law that Petitioner correctly computed its excess profits net income under Section 435(d)(1) of the Internal Revenue Code of 1939 for the 12 months of 1946 in the amount of \$226,590.62.

(6) The Tax Court erred in not concluding as a matter of law that the principles of statutory con-

struction with respect to tax statutes compel it to render a decree in favor of Petitioner and against Respondent.

Designation of Record for Printing

In accordance with the provisions of Rule 17(6) of the Rules of this Court, Petitioner hereby designates the following items for printing in the record on appeal:

1. Docket Entries (Document No. 1)
2. Petition (Document No. 2)
3. Answer (Document No. 3)
4. Amendment to Answer (Document No. 5)
5. Stipulation of Facts with Exhibits 1-A through 3-C attached (Document No. 6)
6. Exhibits 4-D and 5-E admitted on oral Stipulation (Document No. 7)
7. Opinion (Document No. 9)
8. Decision (Document No. 10)
9. Petition for Review (Document No. 11).

Dated: November 21, 1957.

/s/ GEORGE E. LINK,

/s/ CHESTER H. BRANDON,
THELEN, MARRIN, JOHNSON
& BRIDGES.

[Endorsed]: Filed November 22, 1957. Paul P. O'Brien, Clerk.

